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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 303

ERNEST WILLIS ROTHFELDER,
Petitioner,

vs.

SUPREME COURT OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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The Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of Missouri in the above case on April 13, 1959.

OPINIONS BELOW.

There were no opinions rendered by the Supreme Court of Missouri.

JURISDICTION.

The judgment of the Supreme Court of Missouri was made and entered on April 13, 1959, and copies thereof were appended to the Motion for Extension of Time heretofore filed. Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED.

The petitioner having practiced law for five years in Kansas (June, 1953-June, 1958) made application June 30, 1958, to the Missouri Supreme Court to be admitted by reciprocity in conformity with Supreme Court Rule 8.09, pages 4-5, which provided for same, upon fulfilling several other requisites, which was done. On November 12, 1958, petitioner was notified that his application had been denied; and no reason was given. Petitioner requested a hearing with, and reason for denial, of the Board of Bar Examiners, upon whose recommendation the Supreme Court had acted. This request was ultimately answered by the Clerk of the Missouri Supreme Court on January 16, 1959, advising petitioner that his application had been denied upon the ground that he had not engaged in the practice of law in Kansas for five years as required by Supreme Court Rule 8.09. The Board of Bar Examiners ignored petitioner's request for a hearing. On February 23, 1959, petitioner again requested a hearing and tendered evidence on his behalf, this tender and request was met by the Board of Bar Examiners with the statement that the matter was within the jurisdiction of the Supreme Court of Missouri and was out of their hands (See correspondence

in Appendix). Petitioner then filed a motion in the Supreme Court of Missouri for a rehearing, which in actuality was a motion for a hearing, as there had never been a hearing, and affidavits were offered which made a *prima facie* showing of five years of practice. Motion for rehearing was denied. The questions presented are:

1. Whether denial of hearing by Board of Examiners is denial of due process.
2. Whether denial of hearing by Supreme Court of Missouri is denial of due process.
3. Whether the rules established by Missouri Supreme Court for admission to practice law are unconstitutional since they do not provide for any type of hearing before denying any person the right to practice law in the State of Missouri.
4. Whether the Supreme Court of Missouri acted arbitrarily and capriciously in denying admittance to petitioner because of lack of five years practice in view of the affidavits of outstanding people attesting to five years of practice.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court Rule 8.01, Missouri Revised Statutes, 1949, Vol. II.

Applicants for examination for admission to the Bar in this State must be of good moral character, citizens of the United States, twenty-one years of age, and must be, and for at least three months prior to the date of filing their application, must continuously have been *bona fide* residents of this State. The word "resident" as used with reference to admission to practice law in this State, includes *bona fide* residents of this State and any person residing in an adjoining county of an adjacent state who in good faith intends to maintain an office and practice in this State.

Supreme Court Rule 8.09, Missouri Revised Statutes, 1949, Vol. II.

In the discretion of the Court any attorney admitted to practice in the highest court of another state, in which the standard of admission is substantially equivalent to the standard of this state, who shall have engaged in the practice of law for five years in such state, or who shall have taught as a full-time instructor for five years in any law school or law schools fully approved by the Council on Legal Education and Admission to the Bar of the American Bar Association and who has not discontinued such practice or teaching for such length of time prior to the making of application as to prevent the applicant from being well versed in the current state of the law, may be admitted by the court as an attorney without examination. Such attorney shall make written application to the court on forms to be furnished by the clerk (and furnish affidavits of good moral character by two members of the Bar of this state of at least five years' standing at the Bar, and a certificate respecting his practice signed by a judge of a court of gen-

eral jurisdiction of the state in which he has practiced), and pay to the clerk a filing fee of One Hundred Dollars ($100.00), and make satisfactory proof that he is such attorney, a citizen of the United States, a resident of the State of Missouri, or intends presently to become such resident, at least twenty-six years of age and of good moral character. An applicant shall engage the services of the National Conference of Bar Examiners, Equitable Building, Denver, Colorado, to make a report to the clerk of this court on his or her character, which report, together with application and files, the clerk will forward to the Board of Bar Examiners for consideration and recommendation to this court. The fee of One Hundred Dollars ($100.00) paid by the applicant shall not be subject to withdrawal by the applicant in the event he should decide to withdraw his application, or his application be denied. Admission, without examination is not a matter of right but in every case will be decided on the basis of the public interest considering the character, education, extent and continuity of practice and the ability of the applicant.

STATEMENT.

This cause arises out of the denial of a hearing on application by petitioner to the Supreme Court of Missouri praying admission to the practice of law in Missouri under the provision of Supreme Court Rule 8.09, pages 4-5, as it existed at the time of the application. This rule permitting an attorney who was admitted to practice in another state and who had had at least five years of practice to be admitted to practice in Missouri if he resided in Missouri or in an adjoining county of a sister state Rule 8.01, page 3. (The last clause of this rule has since been abrogated.) At the time of application, this petitioner had practiced

continuously for five years in the State of Kansas. The full text of the denial of the petitioner's application and as reflected in the transcript is herein set out:

> "In re: Ernest Willis Rothfelder—Application for license under Rule 8.09 denied."

The reason set out by the Supreme Court of Missouri, January 16, 1959 (Appendix, p. A3) is not included in the transcript, a fact unknown to the petitioner until after perusal of the transcript. This was the occasion for his request for an extension of time for which to file this petition. At the time the Supreme Court of Missouri denied his motion for rehearing, he had been in practice for a period of almost six years. The petitioner's motion entitled, "Motion for Rehearing", was actually an application for hearing, since to the time of its filing, this petitioner had never been accorded a hearing on his application before the Supreme Court.

The petitioner did not seek a rehearing after receiving notice from the Supreme Court of Missouri of denial of a "rehearing" dated April 16, 1959, instead petitioner sought permission to take the bar examination which was to be given in June, hoping to avoid further litigation and embarrassment. However, petitioner was subsequently denied permisson to take said examination. By this time, the fifteen days had passed in which petitioner could have filed a motion with the Supreme Court of Missouri seeking a rehearing and citing the Fourteenth Amendment and the denial of due process.

The denial of hearing by the Supreme Court of Missouri is found on the last page of the transcript of record.

Transcript of proceedings in the Supreme Court of Missouri was attached to the motion for extension of time filed heretofore.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because it violates the constitutional guarantees of due process in the Fourteenth Amendment to the Constitution of the United States.

According to 12 Am. Jur., Constitutional Law, Sec. 573, Essential Elements of due process:

> The essential elements of due process of law are notice and an opportunity to be heard[1] and to defend[2] in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause. One of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College Case, in which he declared that by due process of law is meant "a law which hears before it condemns; which proceeds upon inquiry; and renders judgment only after trial." Somewhat similar is the statement that it is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered.[3]

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for

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1. *Powell* v. *Alabama*, 287 U.S. 45; *Blackmer* v. *United States*, 284 U.S. 421.

2. *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373; *American Surety Co.* v. *Baldwin*, 287 U.S. 156.

3. *Snyder* v. *Massachusetts*, 291 U.S. 97.

reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment. Irrespective of whether the practice of law is a "right" or "privilege", a person cannot be prevented from practicing law except for valid reasons, such practice not being a matter of the state's grace. *Rudolph Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232.

We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. *Konigsberg* v. *State Bar of California*, 353 U.S. 252.

All evidence submitted by petitioner in the record is contrary to the finding of the court below, and hence, the ruling of the court is arbitrary and discriminatory and as such it is a denial of due process and equal protection of the laws.

A hearing is an opportunity to be heard and is an essential element of due process of law.

"Due process" demands only that law shall not be unreasonable, arbitrary, or capricious, and that means selected shall have real and substantial relation to object. *Webbia* v. *People of the State of New York*, 291 U.S. 502.

The due process clause of the Fourteenth Amendment, U. S. C. A. Const., restrains state action whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. *Ownhey* v. *Morgan*, 256 U.S. 94.

As has been stated previously, petitioner has never been accorded a hearing by either the Board of Bar

Examiners or the Supreme Court of Missouri. The petitioner requested the Board grant a hearing and also filed a motion in the Supreme Court of Missouri requesting a hearing. Both requests being denied, petitioner has only one court left to appeal to, that being the Supreme Court of the United States.

If this arbitrary action of the Supreme Court of Missouri is not overruled, petitioner will be deprived of an opportunity to practice law in a community in which he is well and favorably known. Petitioner living across the river from St. Joseph, Missouri, has associated and mingled in the community life of St. Joseph and for almost one year, because of this discriminatory ruling, has been deprived of making his living in St. Joseph.

The practice of law in the small Kansas County of Doniphan hardly affords petitioner enough opportunity to make a decent living for his family of six.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

JOHN E. DOWNS,
Counsel for Petitioner.